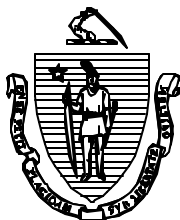


APPENDIX B

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Commonwealth of Massachusetts
**DEPARTMENT OF HOUSING &
 COMMUNITY DEVELOPMENT**

Mitt Romney, Governor ♦ Kerry Healey, Lt. Governor ♦ Jane Wallis Gumble, Director

Chapter 40B Task Force Agenda

Tuesday, March 18, 2003

10 AM - 12 PM

DHCD Conference Room A

1. Introductions/Come to Order (*10 minutes*)
 Fred Habib, Deputy Director of DHCD, Facilitator
2. Economic Impact of Housing (*10 minutes*)
3. Presentation/Statistical Analysis of Chapter 40B (*15 minutes*)
 Bonnie Heudorfer, Consultant
4. Presentations and Roundtable Discussion: (*1 hour*)
Chapter 40B from the Community Perspective and from the Development Perspective
 - Kathleen O'Donnell
 - Mayor Sharon Pollard
 - Jon Witten
 - Matthew Feher
 - Bill McLaughlin
 - Jeff Rhuda
 - Gwen Pelletier
5. Legislative Overview (*5 minutes*)
 - Steve Carvalho
 - Aaron Gornstein
 - Elizabeth Dillan
6. Concluding Remarks/Agenda for Next Meeting (*20 minutes*)
 Fred Habib, Deputy Director of DHCD, Facilitator

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Commission Members:

Jane Wallis Gumble	Task Force Chair, Director, DHCD
Fred Habib	Facilitator, Non-Voting member, Deputy Director, DHCD
Mark Bobrowski	Municipal Consultant, Professor, New England School of Law
Senator Harriette Chandler	Senate Chair, HUD Committee
Jack Clarke	Director of Advocacy, Massachusetts Audubon Society
Howard Cohen	Board Member, Citizens Housing & Planning Association
Representative Michael Coppola	Massachusetts House of Representatives
Marc Draisen (<i>Absent</i>)	Executive Director, Metropolitan Area Planning Council
<i>Represented by Judith Alland</i>	
Steve Dubuque	President, Massachusetts Non-Profit Housing Association
Representative Robert Fennell	Vice Chair, HUD Committee
Thomas Gleason	Executive Director, MassHousing
Bennet Heart	Attorney, Conservation Law Foundation
Representative Kevin Honan	House Chair, HUD Committee
Michael Jaillet	MMA Housing Subcommittee
Al Lima	Planning Director, City of Marlborough
Bill McLaughlin	President, Rental Housing Association of the GBREB
Kathleen O'Donnell	Attorney, Kopelman & Paige
Gwen Pelletier	Board Member, Massachusetts Association of CDC's
Mayor Sharon Pollard (<i>Absent</i>)	City of Methuen
Jeff Rhuda	Homebuilders Association of Massachusetts
Representative Harriett Stanley	Massachusetts House of Representatives
Senator Bruce Tarr	HUD Committee
Senator Susan Tucker	HUD Committee
Senator Dianne Wilkerson (<i>Absent</i>)	Massachusetts Senate
<i>Represented by Ron Marlow</i>	
Clark Ziegler	Executive Director, Massachusetts Housing Partnership

Attendees (as documented on the sign-in sheet):

Sandra Austin	Law Office of Arthur Bergeron
Chris Blanchard	New England School of Law
Roger Blood	Town of Brookline
Marilyn Contreas	DHCD
Joy Conway	GBREB
Elizabeth Dillen	Office of Representative Honan
Colleen Duffy	MassHousing
Lynn Duncan	Planner, Town of Wilmington
Matthew Feher	Massachusetts Municipal Association
Anthony Flint	Boston Globe
Bonnie Heudorfer	Consultant
Anne Marie Gaertner	DHCD
Kurt Gaertner	Executive Office of Environmental Affairs
Nancy Goodman	Environmental League of Massachusetts
Aaron Gornstein	CHAPA
Representative Frank Hynes	House of Representatives

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Attendees Continued

Jonathon Little	House Minority Leader's Office
Ruth Luna	Interested Citizen
Ruston Lodi	Massachusetts Housing Partnership
Hannah Moore	Office of Representative Karen E. Polito
Chris Norris	CHAPA
Kristen Olsen	DHCD
Bill Reyelt	DHCD
Kevin Sanginario	Office of Senator Chandler
Matt Scafidi	New England School of Law
Dave Slatery	MassDevelopment
Anne Tate	Office of Commonwealth Development
Jon Witten	Horsely & Witten, Inc.
Sarah B. Young	DHCD

Materials Distributed:

- Bills that were submitted by Representative Frank Hynes that were not distributed at the 3/6/03 meeting
- Letter submitted by John J. Decoulos to Governor Romney
- Comprehensive Permit Chronology, prepared by DHCD
- *The Homes of 40B: Case Studies of Affordable Housing Using the Comprehensive Permit*, Prepared by CHAPA
- Case Study of Marlborough project, prepared by Bill McLaughlin
- Study of the 40B projects in Barnstable County, prepared by Gwen Pelletier

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FINAL MINUTES OF THE MARCH 18, 2003 MEETING

Introductory Remarks & Adoption of March 6, 2003 Minutes:

Fred Habib, Task Force Facilitator and Deputy Director of DHCD, brought the meeting to order shortly after 10:00 AM. He noted that Judith Alland was representing Marc Draisen who was out of state and was not able to attend today's meeting. Mr. Habib also introduced Mark Bobrowski, Municipal Consultant and Professor at New England School of Law, who was not present at the previous meeting. Mr. Habib noted that he had intended to clarify his role with the Task Force at the previous meeting but had not done so. He explained that he was the Task Force facilitator and not a voting member, noting that DHCD had learned from past experience that having a facilitator for these types of committees enables the chair to actively participate.

Mr. Habib asked the Task Force to direct its attention to the minutes of March 6, 2003 Task Force Meeting. He noted that the Minutes from the March 6, 2003 Task Force Meeting and the Agenda for today's meeting had been emailed to everyone who attended the previous meeting (both members and attendees). Mr. Habib then proposed breaking down the list of issues that appears at the end of the March 6, 2003 Minutes into two categories; 1. Problems and 2. Topics for Future Meetings. Mr. Habib requested a motion to approve the minutes from the March 6, 2003 Task Force meeting.

Steve Dubuque, President of Massachusetts Non-Profit Housing Association, noted that the March 6, 2003 Minutes did not reflect his comments on the problems with the current real estate tax system and concerns about affordable housing adding school children. He requested that those comments be added to the March 6, 2003 minutes.

Twenty Task Force members voted in favor of adopting the March 6, 2003 Minutes with the changes proposed by Mr. Habib and Mr. Dubuque. Mr. Bobrowski abstained from voting since he was not present at that meeting. It should also be noted that the designated representatives for Senator Dianne Wilkerson and Marc Draisen did not vote as they were not Task Force members.

40B Task Force Website:

Anne Marie Gaertner, Senior Policy Advisor for DHCD, announced that DHCD staff had developed a 40B Task Force website that would be online later in the day. She noted that DHCD would continually update the website to include any materials distributed at the Task Force meetings. The Task Force website is located at <http://www.state.ma.us/dhcd/Ch40Btf/default.htm> and contains the following:

- Meeting schedule
- Meeting Minutes
- List of Task Force members and links their organizations' websites
- Tool for contacting Ms. Gaertner via email
- Links to the Housing Appeals Committee website and DHCD's existing 40B website
- Planned production guidelines issued by DHCD
- Guidelines for Housing Programs in Which Funding Is Provided Through a Non-Governmental Entity (e.g. NEF guidelines) issued by DHCD
- Summary of 40B regulation changes
- Power point presentations from all meetings
- Correspondence directed to the Task Force

Presentation: Economic Impact of Housing

Ms. Gaertner presented an overview of the impact of housing costs in Massachusetts on the labor force, population migration, and the economy based on the key findings of the *State of the American Dream in Massachusetts, 2002* a joint project of the Center for Labor Market Studies at Northeastern

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University and MassINC. Ms. Gaertner noted that during the 1990s economic growth in Massachusetts was constrained by slow labor force growth, an 18% decline in the portion 20-34 year olds in Massachusetts, and the out migration of roughly 220,000 residents to other states during the 1990s. While wages and salaries grew across the state during the 1990s, salary growth in the Greater Boston area increased four times as much as in Western Massachusetts. Ms. Gaertner also noted that the cost of living in Massachusetts is estimated to be 10-26% greater than the national average, and housing costs are the primary determinant of a state's cost of living.

She noted that the 62% increase in home prices from 1996-2001 and a ranking of 46th in the nation in building permits issued per capita contributed to growing affordability problems and increased housing burdens on renters and homeowners. For many working age families, Massachusetts' high cost of living more than offsets the higher pre-tax salaries they are likely to earn in Massachusetts. She noted that the report concluded that improvements in housing affordability and homeownership rates could help promote the attainment of the American dream by more state families, assist in reducing income and wealth disparities, increase community and civic pride, provide a larger and more stable workforce, and increase the long-term economic competitiveness of the state. Ms. Gaertner's power point presentation is available on the 40B Task Force website.

Responses to the Economic Impact of Housing Presentation

Jeff Rhuda of the Homebuilders Association of Massachusetts said that he was interested in seeing the increase in households compared to the number of building permits issued in Massachusetts.

Representative Harriett Stanley expressed an interest in seeing that comparison broken down by community.

Mr. Habib stated that the requested statistics would be presented at the upcoming meetings.

Ron Marlow, representative for Senator Dianne Wilkerson expressed an interest evaluating the real meaning of the data presented by Ms. Gaertner, and comparing it with the real life experiences of people in the Commonwealth.

Mr. Habib responded to Mr. Marlow noting that the US Department of Housing & Urban Development (HUD) had just released new information on poverty levels throughout the state and that he would make that information available at the next meeting.

Presentation: Statistical Analysis of 40B

Bonnie Heudorfer, independent housing consultant, presented the findings of her analysis of the use of the comprehensive permit in Massachusetts with the intent of providing the Task Force with the facts and framework needed to evaluate the effectiveness and limitations of Ch. 40B. Ms. Heudorfer reported that when the first subsidized housing inventory was released in 1972, 69% of all subsidized housing units were in the 15 largest cities, and as subsidized housing expanded beyond urban centers that number dropped to 53%. Ms. Heudorfer noted that more than 235 communities have processed comprehensive permit requests, and that in the past thirty years comprehensive permit projects have accounted for 34% of all newly constructed affordable units in communities below 10%. She reported that comprehensive permits were accountable for over 28,000 units in 485

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developments in over 200 communities, and that 64% of these units serve low and moderate-income households.

Ms. Heudorfer noted that the comprehensive permit was originally a vehicle designed to enable state and federal production programs to work in more communities, and that with the reduction and elimination of public subsidy programs the comprehensive permit is now one of few remaining tools available to build housing of any type, for all income groups. Ms. Heudorfer reported that household growth outstripped unit production by 50% from 1990 to 2000, driving vacancy rates down and home prices/rents up.

Ms. Heudorfer reported that of the 415 appeals filed with the HAC between 1990 and 2002, 45% were withdrawn or dismissed and 24% reached negotiated settlements with stipulations with the HAC. She noted that between 1990 and 2002 only 31% of the appeals filed with the HAC received an actual HAC decision. She added that of the 31% of the appeals that received HAC decisions, 84% were in favor of the developer and 16% were in favor of the municipality. She noted that the power of delay could be seen in the fact that fewer than half the cases appealed to the Housing Appeals Committee (HAC) between 1969 and 1999 were built, despite rulings or settlements that enabled them to proceed. Ms. Heudorfer concluded by noting that with the significant recent progress many communities have made towards subsidized housing, more and more communities are now looking at 10% as reasonable target. She added that in the past five years comprehensive permit projects have accounted for 80% of all newly constructed affordable units. Ms. Heudorfer's complete power point presentation is available on the 40B Task Force website.

Responses to the Statistical Analysis of 40B Presentation:

Bill McLaughlin, President of the Rental Housing Association of the GBREB, noted that 40B is responsible for the creation of many market rate units that would not otherwise have been built which are not reflected in Ms. Heudorfer's numbers.

Representative Harriett Stanley expressed her concern that the market rate units created with comprehensive permits increase the number of year round housing units in each community, which causes the number of units a community needs to reach 10% to rise.

Mr. McLaughlin responded that with the increase of new households at rate of 50% higher than the number of new housing units (1990-2000), the market rate units created with 40B are much needed.

Representative Harriett Stanley asked if the Task Force was discussing affordable housing or high-income housing.

Mr. McLaughlin responded that the Task Force was discussing both.

Attorney Kathleen O'Donnell of Kopelman & Paige noted that when developers can't build under 40A, they are forced to use 40B which forces developers into affordable housing production who are not interested in affordable housing, just to get the market rate housing produced.

Steve Dubuque of the Massachusetts Non-Profit Housing Association asked the Task Force to consider that 40A has changed as communities went from ½ acre zoning, to 1 acre zoning, to 1 ½ acre zoning. He added that building with 40B is not building on unsuitable land but building

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more dense than the underlying zoning allows. He also noted that there are now fewer deep subsidies for 40B projects.

Mr. McLaughlin noted that there is a significant difference in how units are counted when 40B is applied on rental versus ownership. All rental units (even the market rate units) count on the subsidized housing inventory. Whereas only the ownership units that are affordable are counted.

Howard Cohen, Board Member of the Citizens Housing & Planning Association, noted that during the 1970s when 40B projects were mostly all subsidized units communities requested that developers do mixed-income. He asked Task Force members to remember that one of the goals of the statute is to avoid concentration of poverty, and that Massachusetts is doing much better now than before towards this goal. He then acknowledged that there are counting issues that are of concern to him.

Senator Bruce Tarr suggested that the Task Force needed to look at the planning process overall, since it seems like 40B has been transformed into something developers need to use in order to build anything. He noted that this didn't seem very efficient when 50% of the units appealed do not get built.

In response to the comments made that noted a relationship between 40A and 40B, Jane Wallis Gumble, Chair of the Task Force and Director of DHCD, noted that it would be very difficult for the task force to discuss both 40A and 40B and move forward. She added that she would recommend that the next task force the governor should set up should be to study 40A, and that she would be happy to work on it. She added that since 40B has the most pressure points it is the current focus of the Task Force.

Senator Bruce Tarr proposed linking zoning with affirmative defenses.

Representative Michael Coppola noted that 40A was getting too much of the blame, and that the communities that he represents do not have large lot size requirements, but they do have requirements on the type of housing that could be built there.

Mr. Habib suggested that an analysis of learning why 40B is being utilized so much would be useful.

Representative Harriett Stanley suggested an analysis of the growth rate needed to get to 10% with all rental units compared with all ownership units for communities currently at 0%. She noted that her staff had done this analysis but it would be helpful for somebody else to do it as well.

Presentations and Roundtable Discussion: Chapter 40B from the Community Perspective and from the Development Perspective

Mr. Habib noted that the goal for the presentations of the community, neighborhood, and developer perspectives of the 40B process is to identify problems with the process and then to further identify solutions, and he encouraged Task Force members to engage in discussions as the presentations were made.

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Community and Neighborhood Perspective

Attorney Kathleen O'Donnell noted that she was presenting the community perspective of the 40B process in response to Senator Wilkerson's request at the previous meeting. She noted that the recent regulatory changes made by DHCD related to the New England Fund (NEF) are very good, but they have not had an impact at the local level yet since the majority of projects before ZBAs are NEF projects that were submitted prior to the new regulations.

She noted that first a developer submits application to ZBA, and the application usually consists of a one page letter from developer stating they will be a qualified limited dividend organization, evidence of site control (typically purchase and sale agreement), requested list of waivers, project eligibility letter, abutter's list and an assessor's map. She added that in her experience there are often issues surrounding the evidence of site control, and that sometimes the requested list of waivers is a detailed list, but often it is just a "one-liner" requesting "whatever exemptions are needed." She also noted that the project eligibility letter is typically not a commitment of funding, which means the town and developer are spending a lot of time and money on a process that may not result in construction if the bank decides not to finance the project.

Mr. McLaughlin responded to Attorney Kathleen O'Donnell's comments, acknowledging that there are still projects with the problems she had just described in the pipeline, but that the regulations DHCD had recently issued would prevent future recurrences. He suggested that it would be more useful and productive to look forward towards problems that had not yet been addressed and fixed.

Attorney Kathleen O'Donnell noted that not enough time has passed to know if the problems had been fixed.

Mr. Bobrowski noted that the new regulations providing towns with the ability to delay related applications for a 12-month "chill period" has had some unintended consequences. He added that developers who weren't planning to use 40B, do so because they know that they would have a year delay if they were denied on a special permit CH 40A request.

Mr. Rhuda added that the related applications regulation takes away the threat of 40B, because most developers can't afford that type of delay.

Mark Bobrowski noted that one of the problems created by the NEF is that it "trained" boards to think that they had the ability to request all financials, and now analysis of this information is in the purview of the Project Administrator.

At this point Attorney Kathleen O'Donnell returned to her presentation, and identified the key players in the process as the ZBA, developer, attorney for the developer, attorney for the town, engineers and consultants for the developer, consultants for the town (paid for by the developer), and the town planner. She noted that ZBAs are volunteer boards and some towns don't even have full-time planner (if any). She noted that this is an expensive process, and that ZBA's often face considerable pressure from their Board of Selectmen for spending so much money reviewing one application.

Attorney Kathleen O'Donnell noted several stress points in the process:

- Costs to the developer v. Information needed by the ZBA
- Lack of cooperation or communication amongst town boards prevents the ZBA from getting the input they need

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- Development may not be responsive to the town's actual needs
- Use of the HAC as a threat to prevent towns from placing conditions on comprehensive permits or to get a quick decision.

Jon Witten, Partner of Horsely and Witten, Inc., with a background as a planner and now a land use attorney, noted that his clients' greatest concern is the lack of density limitations imposed by the statute. He added that under 40B the developability of a parcel which has water/sewer is unlimited, which wreaks havoc on the town and the abutter. Mr. Witten expressed his concern about MassHousing's due-diligence efforts with respect to density. He also expressed concern about the lack of due process under 40B. He added that abutters are outraged that the zoning approved by their town is overruled by 40B. Mr. Witten also noted that he thought it was ironic that in a state with such a strict policy for variances on zoning bylaws duly adopted by the public process, 40B allows all those bylaws to be disregarded.

Mr. Dubuque noted that the town of Duxbury has recently passed bylaws intended to slow down growth and to assure water supply protection. He added that while he supported local control, 40B is in response to those who use local control to limit the people who can build in town. He noted that it has been said that the Task Force should hear from abutters and suggested that they should also here from people who don't have a place to live and from those who have a certificate but can't find a place to live.

Mr. Witten noted that Duxbury also adopted the state's first mandatory inclusionary zoning bylaw and that California and Maryland have inclusionary zoning requirements. He suggested that Massachusetts pursue inclusionary zoning.

Developer Perspective

Mr. Rhuda, Mr. McLaughlin, and Gwen Pelletier of the Massachusetts Association of CDCS presented the Developer perspective of the 40B process. Mr. Rhuda presented first. He noted that he believed there was a direct relationship between the use of 40B and "no-build" communities. He added that he had done a comparison of several towns in Essex County with building caps, and the number of 18 year olds in those communities (used 50% of 18 year olds as a rough guess of number of new households that could be expected). In this comparison he found that there would not be enough new housing units for the new household demand generated by the 18 year olds moving out of their parents homes. Mr. Rhuda noted that the communities featured in his presentation with building caps are exporting their housing growth to neighboring communities. He also noted that he had found that almost all of these zoning ordinances exempt senior housing from building caps and warned this practice constituted discrimination.

Mr. Rhuda noted that the Massachusetts Department of Environmental Protection (DEP) has some of the toughest regulations on wetlands in the nation. He added that when DEP makes decisions they look at the big picture not just wetlands because they are making decisions for the whole state. He expressed his concern that communities make DEP irrelevant when they enact regulations that are stricter than DEP's. He added that 40B is the only way for developers to appeal for relief from locally imposed wetlands regulations.

Mr. Witten responded noting that community regulations are well intended and take into account the local concerns. He added that the underlying basis of these actions are to keep resources protected.

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Mr. Rhuda agreed that communities were well intended but questioned whether communities and conservation commission have more data, experience, training, and knowledge than DEP. He described an example of how the state highway system would be negatively impacted if communities had the ability to override state regulations and standards for highways in the same manner that they can override state regulations and standards for wetlands. He argued that acting from a local perspective with the intention of ensuring public safety and not necessarily considering regional impacts, communities would set lower speed limits, which would cause major traffic problems regionally.

Jack Clarke of the Massachusetts Audubon Society noted that he did not have much faith that state agencies could do the job as well as those with local knowledge.

Mr. Habib observed that there seemed to be consensus that while towns are well intentioned, these local regulations are a reality affecting 40B.

Mr. Rhuda noted that he believed excessive local regulations can invite 40B activity.

Mr. Bobrowski observed that the theme of the day's discussion seemed to be the lack of planning under 40B and its relation to 40A, and added that he thought this was only part of the picture.

Mr. Witten noted that Rhode Island requires cities and towns to look at a list of specific critical issues before passing local zoning bylaws/regulations, and suggested that in not requiring this of communities Massachusetts was "behind the curve".

Attorney Kathleen O'Donnell suggested that it would be useful to provide planning resources and assistance to communities to ensure that the conditions imposed by communities on comprehensive permits are followed.

At this point Mr. McLaughlin began his power point presentation, which profiled a number of projects that his company, Avalon Bay, had done in Massachusetts. He noted that Avalon Bay is a large developer that had built approximately 3,800 units in Massachusetts with an additional 1,500 in the pipeline. He noted that 'Avalon Oaks West' in the town of Wilmington was located on a 27-acre parcel of which only 9 acres were developed. He added that development of 'Avalon Ledges' in Weymouth was concentrated to 20 of 58 acres of the parcel, and that Avalon had provided \$2 million worth of sewer/water improvements to Weymouth. Mr. McLaughlin noted that 'Avalon at Newton Highlands', which provided the housing piece to a city area zoning mixed-use/commercial was approved for a comprehensive permit after a single hearing (one night). He added that this project will provide 74 affordable apartments (25% of all the affordable units in the town) and that so far 1,100 applications have been received for these 74 units.

Mr. McLaughlin also shared a number of statistics from Avalon Bay 40B developments. He noted that Avalon Bay averages 8 - 10 months for local review of comprehensive permit applications, the average number of local conditions on their comprehensive permits is over 31, and that Avalon Bay provides an average \$800,000 in infrastructure improvements to communities. He noted that Avalon Bay has gone to HAC twice which proved to be very expensive. He also referenced a case study of the 156 unit Avalon Orchards development in Marlborough. The study found that the 156 units contained fourteen students, and seven of those students already lived in the city (internal migration).

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Ms. Pelletier noted that her experience has been with small-scale housing development. She described a number of small scale projects that could only be built with 40B, including the 885 state highway project in Eastham that consisted of 5 units on 2 ½ acres as well as a Habitat for Humanity project that consisted of 1 unit. Ms. Pelletier noted that ZBAs are often slow in getting response/reports from other town boards, especially in towns that have not had previous experience with 40B. She added that though there is a great deal of concern about any development in general and potential influx of outsiders, community members usually have a positive response once the project is completed. She noted that private non-profit agencies usually do 100% affordable units. She then distributed a handout of 40B projects in Barnstable County.

Senator Harriette Chandler asked Ms. Pelletier if it was usual to have to use 40B to do a single unit. Ms. Pelletier responded that it was not normal to have to use 40B for a single unit, but that in the case she mentioned it was necessary.

Mr. Dubuque noted that he works with Habitat for Humanity and that they often use land donated by towns. He added that the land donated by towns is usually not developable under existing zoning.

Mr. Habib asked if anyone would like to comment on this presentation.

Representative Harriett Stanley noted that she would like to share some anecdotal examples of abuses of 40B, and that she hoped to get equal time.

Mr. McLaughlin noted that he would like to hear from Representative Stanley about the abuses.

Mr. Witten noted that nobody takes issue with Ch. 40B housing once it is built, and then reiterated his concern that the process itself is offensive to communities because it disregards their well intentioned and lawfully adopted zoning bylaws.

Representative Michael Coppola agreed that towns are well intentioned when they adopt zoning to protect wetlands. He asked “if 40B is creating affordable housing, why are we so low in the country when it comes to the affordability of housing?”

Mr. Cohen noted that there is no question that the land use system in Massachusetts is a mess. He added that the problem is that each community acting in own self-interest has a cumulative negative impact. He noted that 40B has been on the books for 30 years, and that it “pops-up” when there are shortages in response to demand. He noted that 40B has not been a big problem when it comes to abutters and stated that the data shows that there is no negative impact of these developments on the value of neighboring property. Mr. Cohen added that before the Supreme Judicial Court issued its decision. Mr. Witten’s argument would have been relevant, but now it’s not.

Mr. Habib observed that the Task Force was looking at focusing on two possible tracks: 1) The process of 40B and 2) Everything else that is affecting 40B. Due to time constraints he postponed the legislative overview and the discussion of the process for the group’s report to the Governor until the next Task Force meeting.

Representative Kevin Honan noted that he would like to look at the numbers needed for the average community that is non-compliant with 40B to get to 10%.

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Senator Harriette Chandler added that she would like to see how long it would take to get to 10% with a rate of .75% annual progress.

Mr. Bobrowski noted larger communities (with populations of 35,000) such as Billerica, Dracut, and Chelmsford feel that it is just not possible to get to 10%.

Mr. Habib suggested categorizing communities by size when looking at what it would take to get to 10%.

Representative Michael Coppola noted that he would like to see some numbers of school age children in 40B developments.

Mr. Habib asked if Task Force members wanted to hear from the HAC at the next meeting. It was decided to postpone a discussion of the HAC.

Mr. Witten asked if Task Force members were interested in rethinking the 10% goal. He noted that states that have successfully implemented inclusionary housing have looked at housing needs regionally rather than statewide. He then asked for clarification of the rational behind the 10% goal.

Senator Chandler agreed that the Task Force should evaluate the 10% goal.

Mr. Dubuque noted the need to ask communities what they've done for affordable housing in past 20 years.

Senator Tarr suggested that the goal of 40B should be higher than 10%, but added that other types of housing units should count towards the subsidized housing inventory than are currently counted.

Bennet Heart of the Conservation Law Foundation expressed concern that it would take more than the 5 minutes allotted in the agenda to do a legislative overview. He added that it would be helpful to spend a little time explaining the rational for the regulatory changes that were made and those that were not made.

Mr. Habib responded that the legislation can be divided into categories (e.g., counting, developer actions, etc.) and that many contain similar proposals.

Judith Alland representative for Marc Draisen, asked that the changes made thus far be examined with an eye toward what changes (if any) still need to be made.

Mr. Habib reminded Task Force members that more examples of 40B developments were in the booklet that had been provided to them titled "The Homes of 40B: Case Studies of Affordable Housing Using the Comprehensive Permit"

Senator Chandler asked if Ms Gaertner had received the letter from the Boxborough Board of Selectmen, and if there were plans to distribute it. Ms. Gaertner responded that she had received a copy of the letter and that it would be posted on the Task Force website.

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Themes from 40B Task Force Discussion 3-18-03

Note: This information is a summary of the problems that we discussed and presentations that were suggested for future meetings of the 40B Task Force. We have added to and reorganized the list by topic while highlighting requests for future presentations in *bold*. This list has evolved from the information found at the end of the minutes of March 6, 2003.

Chapter 40B process

- Concerns about the beginning of the process – Should initial letters to the ZBA contain more information, should cities and towns go through a lengthy and costly process if letter is not a commitment of funding
- Proposed developments might not be responsive to towns needs
- Concern about lack of density limitations
- Should zoning in Master Plans be linked to relief from 40B
- Where do we want to foster growth – Smart Growth/regional growth patterns/Low Income Housing Tax Credits
- Many 40B developments are not being built – even when approved by HAC
- *Present and discuss Audobon Society proposal on regional housing plans and credits*
- *Present what other states have adopted to promote the development of affordable housing (e.g. RI – inclusionary zoning, Maryland, Smart Growth)*
- *Ask the HAC to present information to the group*

Should 40B be building market units and affordable units?

- In the 1970's when there were more state subsidies, comprehensive permits were used to build 100% affordable developments. In the 1990's, lack of subsidies requires market rate units to "cross-subsidize" the affordable units.
- Concern re: concentration of poverty if all units are affordable
- Middle income housing affordability gap
- *Present LMI figures for each community*

Counting

- How ownership units are counted results in communities "chasing their tale" – Presentation by Rep. Stanley
- Is 10% the right number? Should it be applied regionally? Should it be higher and count more types of units?
- *Present # of affordable units in communities without subsidies*
- *How long will it take communities to get to 10%? (at a rate of .75% annually, in larger communities)*
- *Present # of units each city and town needs to achieve 10%*

Reasons why 40B is being used

- Misuse of 40A forces developers to use 40B
- Enormous pressure not to develop
- Wetlands and other environmental regulations (Title 5) that are more restrictive than the State statute invite use of 40B (no set criteria for cities and towns before they pass local zoning and bylaw regs)
- Local zoning assists people who already have housing and does not assist people who do not yet have housing

FINAL MINUTES OF THE MARCH 18, 2003 MEETING

- Local control limits regional planning
- To redress restrictive zoning and lack of planning
- It is in the developer self interest to achieve other development plans
- The local permitting process is time consuming and adds to the cost of development
- No zoned land for multi-family housing by right
- Dramatic “downsizing” as less dense uses are now allowed
- Land use planning system is dysfunctional
- Limited sites available
- Mandatory inclusionary zoning is not the law in MA
- *Present information on which communities on which communities are undertaking EO 418 Plans*
- *Present # of units built outside of the 40B process that qualifies for the 40B inventory*
- *Present resources for building housing outside of the 40B process*
- *Present increase in 40B housing compared to building permits*
- *Present building caps by community*
- *Present how many cities and towns have wetland regs. stronger than DEP*

Municipal impacts

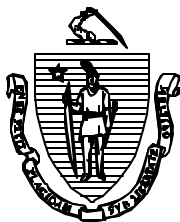
- What is the impact on local services
- Density impacts water and sewer capacity, transportation, etc.
- *Present data on school children and educational costs*

Local Capacity and Coordination

- Limited local capacity; ZBA's may be limited by:
 - knowledge of planning rules, con comm. (waiver)
 - lack of capacity/communication from other boards
 - lack of capacity to evaluate financials, local housing needs
 - threat of developer going to HAC undercuts ZBA's authority
 - myth vs. reality of 40B impacts local outcomes
 - need for consultants to do peer review
- Communities may be limited by:
 - no planners on staff
 - limited local resources
- Developers:
 - have trouble getting timely responses
 - struggle with the costs of lengthy process that has no assured end date

New Regulations

- Are the new DHCD regulations effective
- Existing NEF applications are not impacted by new NEF regulations
- *Present the rationale for the changes made and discuss what wasn't done and why*
- *Review unintended consequences from the 12 month cooling off period*



Commonwealth of Massachusetts
**DEPARTMENT OF HOUSING &
 COMMUNITY DEVELOPMENT**

Mitt Romney, Governor ♦ Kerry Healey, Lt. Governor ♦ Jane Wallis Gumble, Director

**Summary of
 Recent 40B Regulatory Changes**

March 2001

1. Developers to provide notice to DHCD of application for Project Eligibility (Site Approval) to a subsidy agency
2. Subsidy Agencies to provide notice to communities of application and provide a 30-day period for the receipt of comments.
3. Developers to notify DHCD of receipt of a Project Eligibility (Site Approval) letter.

August 2001

1. Subsidy Agencies must provide enhanced information in Project Eligibility (Site Approval) letters based on more thorough analysis of the project and the site.
2. DHCD to include housing that serves DMH/DMR clients on the subsidized housing inventory
3. DHCD to include units on the subsidized housing inventory at the time when permit is final
4. A community may deny a comprehensive permit if it has increased its affordable housing stock by two percent (2%) in the prior 12 months
5. A community may deny a comprehensive permit if the project size exceeds certain limits based on the number of a community's year round housing stock.
6. A developer may not submit an application for a comprehensive permit if twelve months has not elapsed between the date of application and any of the following:
 - (i) the date of filing of a prior application for a variance, special permit, subdivision or other approval related to construction on the same land if that application included no low or moderate income housing,
 - (ii) any date during which such an application was pending before a local permit granting authority,
 - (iii) the date of disposition of such an application, or
 - (iv) the date of withdrawal of such an application

August 2002 Emergency Regulations (finalized December 20, 2002)

1. Local programs qualify for inclusion on the subsidized housing inventory
2. Accessory apartments serving households at 80% AMI will be included on the subsidized housing inventory
3. Communities must send DHCD copies of Comprehensive Permits issued

APPENDIX B

4. DHCD will update the in subsidized housing inventory every 2 years
5. The Housing Appeals Committee may receive as evidence and consider municipal plans
6. A community may deny a comprehensive permit if it has a housing plan that has been certified by DHCD and the community has added units pursuant to the plan that results in an increase in its number of low or moderate income housing units (which are eligible for inclusion on the subsidized housing inventory) by at least 3/4 of 1% of total units every calendar year.
7. Project Eligibility (Site Approval) letters and Final Approval must be issued by quasi-public or state agencies to developers of projects that use funding from non-governmental entities (e.g. the New England Fund). The quasi public or state agency will also administer the project pursuant to the DHCD guidelines.

Housing and the Massachusetts Economy

Presented to the Chapter 40B Task Force
March 18, 2003

Housing Costs

Across Massachusetts, housing costs have become an issue of economic competitiveness, though the impact varies widely by region.

Excessive housing costs contribute to the outmigration of workers and exacerbate labor shortages, increasing the difficulty of attracting and retaining workers.

Earnings Across Regions

While wages & salaries have grown across the state over the last decade, there have been great disparities with respect to the rate of growth.

Earnings Across Regions

Wages & salaries per employee in Greater Boston increased more than 4 times as much as in Western Massachusetts (27% versus 6%)

- (Middlesex County: 36%)
- (Hampshire County: >1%)

*Labor Force &
The Massachusetts Economy*

Human capital is our most important resource!

- Massachusetts has built its economic success on a highly skilled, highly educated workforce.

*Labor Force &
The Massachusetts Economy*

- During the 1990s, the Massachusetts labor force grew by less than 2%.
- During the 1990s, the United States labor force grew by almost 14%.

*Labor Force &
The Massachusetts Economy*

Slow growth in the labor force poses a serious threat to the state's ability to sustain a healthy economy. The lack of adequate labor supply may prevent new companies from locating in Massachusetts and prevent existing firms from locating here.

*Labor Force &
The Massachusetts Economy*

- The proportion of 20-34 year-olds in Massachusetts declined by nearly 18% during the 1990s.
- Developing strategies to stop the outmigration of young, well-educated workers is a promising way to expand our labor force.

Housing Costs and Population Migration

- For many working age families, our state's higher cost of living more than offsets the higher pre-tax salaries they are likely to earn in Massachusetts.
- Strong circumstantial evidence in the form of large numbers of residents migrating to other states even during economic good times, suggests that many working-age residents already understand they can get a better overall economic deal elsewhere.
 - Roughly 220,000 residents moved out of Massachusetts in the 1990's.

Economic Expansion in the 1990s

Expansion in computer/data processing, engineering research, and architectural service accounted for 25% of net new jobs during the 1990s.

Economic Expansion in the 1990s

- The primary result of concentrated job growth in high-end industries was a sharp increase in demand for 4-year college graduates.
- By the end of the decade, labor shortages in these key occupational segments along with construction trade became a constraint on economic growth in the state.

Housing Costs

- The cost of living in Massachusetts is estimated to be 10%-26% greater than the national average.
 - Housing costs are the primary determinant of a state's cost of living.

Housing Costs

- From 1996-2001, home prices in Massachusetts increased 62%.
- During the same time, home prices rose nationally by 36%.

Income Disparity in Massachusetts

At the end of the 1990s, families in the top 20% of the income distribution earn 11 times more than families in the bottom 20% of the income distribution.

Homeownership & Income

- Massachusetts has the 5th lowest rate of homeownership in the country, despite its above-average incomes.
 - The gap in homeownership rates is largest for incomes below \$50,000.

Housing & Income

- In 1980, the median Massachusetts home cost roughly twice as much as median household income.
- In 2000, the median house cost 3.9 times as much as median household income.

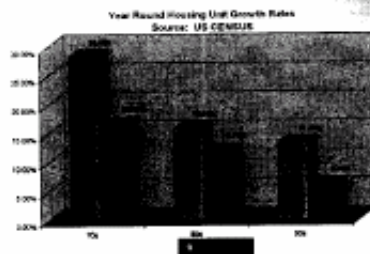
Housing Supply

- During the 1990s, the rate of new home construction in Massachusetts was one of the lowest in the country.
- Limited new supply combined with very high prices contributed to growing affordability problems and increased housing burdens on renters and homeowners.

Housing Supply

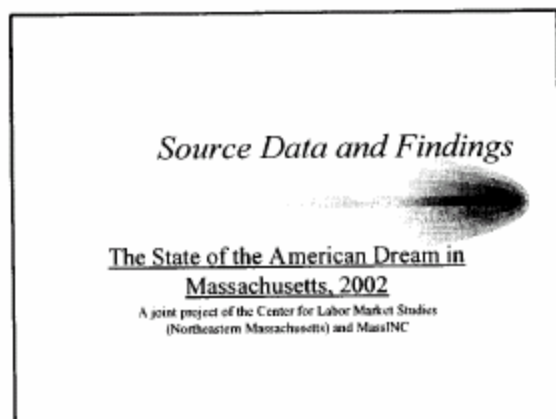
- Massachusetts ranks 46th out of 50 states in building permits per capita
- Single family listings have been declining since 1996
- Multi-family permits in the 1980s averaged 6,792 per year...in the 1990s they averaged only 1,317 per year

Housing Supply



Housing Market and Long-Term Economic Sustainability

“Improvements in housing affordability and homeownership rates could help promote the attainment of the American dream by more state families, assist in reducing income and wealth disparities, increase community and civic pride, and provide a larger and more stable workforce and increase the long-term economic competitiveness of the state.”





Incorporated in 1967

❖ We have built about 1000 single-family homes and condominiums in Massachusetts on a speculative basis.

❖ We currently average about 100 new homes and condominiums a year. This year we are building in Wakefield, Beverly, Medford, Manchester, Georgetown, Amesbury, Littleton and Bolton.

❖ In 2001, we submitted our first 40B application in our 34 year history.



The Decline of Residential Construction in Massachusetts Housing Boom or Decline?

Year	Massachusetts	United States	Massachusetts as a Percentage of United States
2002*	15,675	1,726,556	0.96%
2001	17,034	1,636,676	1.04%
2000	18,000	1,600,267	1.13%
1999	18,957	1,593,533	1.14%
1998	19,354	1,512,250	1.19%
1997	17,406	1,441,126	1.19%
1996	17,351	1,425,616	1.21%
1995	16,428	1,332,540	1.23%
1994	18,115	1,371,637	1.32%
1993	17,460	1,194,053	1.46%
1992	15,411	1,091,833	1.50%
1991	12,672	948,794	1.34%
1990	14,200	1,110,700	1.28%
1989	21,263	1,338,423	1.59%
1988	30,462	1,455,623	2.09%
1987	40,419	1,524,772	2.65%
1986	35,215	1,700,443	2.07%
1985	39,466	1,733,266	2.28%
1984	29,366	1,691,622	1.74%
1983	22,836	1,506,221	1.49%
1982	15,485	1,000,485	1.54%

*December 2002 rev. updated year.

Residential Building Permits Issued
as Reported by U.S. Census



Section 165-14.**New dwelling unit limitation town-wide.**

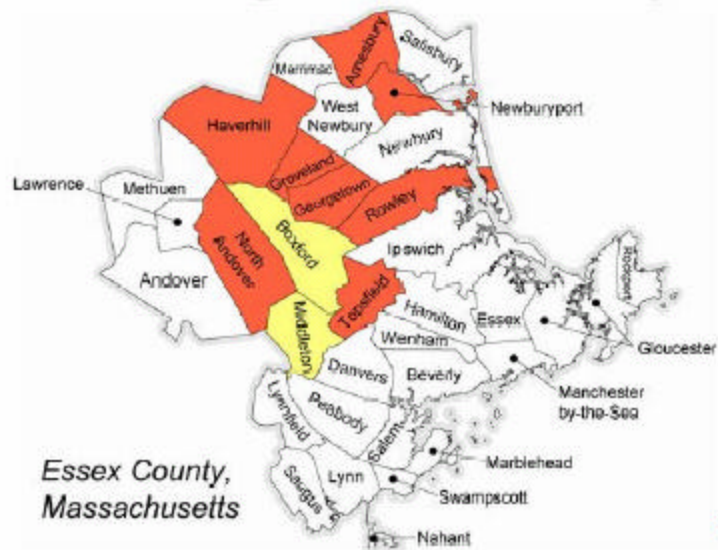
A. Building permits shall not be issued authorizing construction of (or conversion to) more than thirteen (13) Residential dwelling units town-wide in single-family and two-family structures including Residential Condominiums and/or Cooperatives in any twelve-month period. The numbers of Residential Dwelling Units to be allowed in any month shall be determined by subtracting from thirteen (13) units the total authorized (minus permits withdrawn or expired without use) in the preceding eleven (11) months. The eleven (11) prior to enactment of this provision shall be used to establish unit availability during the first year after enactment. [Amended 6/14/99; approved 9/20/99] (Amended STM 10/24/2000; Approved by AG 1/25/2001)



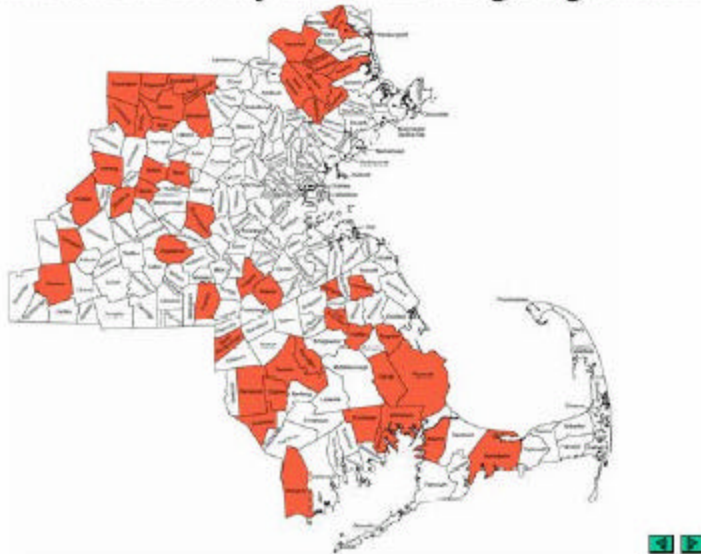

Community	Building Permits, Annual limits	Population	Estimated number of 18 year olds	Possible new households created within the community
Amesbury	48	16,450	198	99
Georgetown	20	7,377	80	40
Groveland	36	6,038	86	43
Haverhill	100	58,969	706	353
Newburyport	48	17,189	161	80
North Andover	80	27,202	413	206
Rowley	24	5,600	67	33
Topsfield	15	6,141	74	37
Totals	371	144,966	1,785	891

 From DHCD Demographics year 2000
  From DHCD Demographics year 2000, 15 to 19 years line divided by 5
 


Communities Limiting Residential Building Permits in Essex County



Communities That Ration or Limit Building Permits on an Annual Basis by Local Zoning Regulations



Section 165-14.

New dwelling unit limitation town-wide.

Section 165-17. Exemptions.

- A. Any unit of affordable housing*
- B. Restoration of a dwelling in existence*
- C. Permits for nonresidential purposes*
- D. Independent Senior Housing*



Other Restrictive Zoning Practices

Wetland Regulations written into town bylaws

- Typical language consistent in these bylaws.

“Other than stated in this section, the exceptions in The Wetlands Protection Act (meaning the state) shall not apply”

“Relation to the Wetlands Protection Act: This bylaw is adopted under the Home Rule Amendment of the Massachusetts Constitution and the Home Rule statutes, independent of the Wetlands Protection Act, M.G.L., c. 131, Section 40, and regulations there under.”



Other Restrictive Zoning Practices

Wetland Regulations written into town bylaws

- Renders D.E.P. irrelevant, D.E.P. has no authority to override town bylaws.
- Over 130 Communities.
- Do local Conservation Commissions really have greater scientific knowledge then D.E.P?
- Forces the consumption of more land per housing unit
- Double jeopardy, now need 2 permits - one from D.E.P. and a local Wetland Permit. Often D.E.P. and local Wetlands regulations are in conflict.



Other Restrictive Zoning Practices

Title V Regulations in excess of State Regulations

- D.E.P. has some of the toughest septic regulations in the country.
- Towns increasing those regulations, sometimes as much as 50%
- Forces the destruction of more land per housing unit.

Home Rule is the opposite of “Common Wealth”

- Repeal of Home Rule would be the Mother of All Battles.
- At least, do not allow municipalities to render state agencies irrelevant.
- State Regulations are Regulations – not minimum standards.
- 40B is not the disease – it is a symptom of the disease.

Other Restrictive Zoning Practices

Abuse of Appeal Process

- \$100 and ten signatures can tie up a project for two years
- Professional appellants
- Abuse of process

Other Restrictive Zoning Practices

Zoning In of any housing restricted to senior housing.

- Even in communities with permit caps, these types of developments are excluded from the permit caps.
- Multi-family Senior housing allowed, multi-family housing for below-55 years old not allowed – Density.
- Under any other microscope – this practice is discrimination and is not equal protection.
- Anti-children zoning.

Other Restrictive Zoning Practices

Zoning Out any multi-family construction that may allow children

Big Lot Zoning or Density Reduction

- It is estimated as much as 70% of the existing housing in the state could not be built today under current zoning-by laws.
- Unnecessary land destruction and consumption



What is the Intent of Chapter 40B?

- In 1969, the intent of Chapter 40B was to address the shortage of affordable housing statewide by reducing unnecessary barriers erected by local zoning and other restrictions
- In 2001, the intent of Chapter 40B is to address the shortage of affordable housing statewide by reducing unnecessary barriers created by local zoning and other restrictions
- Is it possible unnecessary barriers created by local zoning and other restrictions are the real reason we are here today?



Existing building from Lake Street

Use of the Comprehensive Permit in Massachusetts

March 18, 2003

Presentation to the Governor's Chapter 40B Taskforce

Bonnie Heudorfer

Housing and Planning Consultant

1

Introduction

- Goal - provide facts and framework to help you evaluate 40B's effectiveness and limitations
 - Contribution to state's affordable housing inventory
 - Evolution and use over time
 - How current activity mirrors/differs from past
 - Role of the HAC
 - Recent progress

2

CP Production, Existing and Proposed

<u>Status</u>	<u>Developments</u>	<u>Total Units</u>	<u>40B Units</u>	<u>Affordable Units</u>
Existing	485	28,046	24,391	17,896
Approved, ready to go	30	3,564	3,029	824
In process (in negotiation, at ZBA, HAC, or court)	165	14,835	8,665	4,028
With site approval letters, not yet filed w ZBA	57	3,049	1,779	764
Applied for site approval, but not yet granted	52	3,373	2,002	839
Total in process	304	24,921	16,475	6,465
Total existing and in process	789	52,967	40,866	24,360

3

Expanding the Supply

- 28,000+ units (485 developments) in over 200 communities
 - ✓ 3,000 more to begin construction this spring
- 64% serve low and moderate income households
- 81% rental, 19% homeownership
- 285 communities added new units since 1972
 - ✓ CPs were used for more than 1/2 the production in 85 of these
- Average size of developments is 57 units

4

CPs as a % of Subsidized Inventory

- In 1972, 69% of all subsidized housing was in the 15 largest cities; now only 53% is
- 34% of all *newly constructed* units added in past 30 years, in communities below 10%, used the CP
- In past 5 years, CP projects have accounted for more than 80% of all *newly constructed* units added in communities below 10%

5

Increasing Use of CP

- As subsidized housing expanded beyond urban centers, use of CP increased:

<u>Period</u>	<u>% Projects</u>	<u>% Units</u>
Early 1970s	19%	15%
Late 1970s	34%	36%
Mid-1980s	63%	63%
Mid-90s to Present	70%	81%

6

Geographic Expansion

- 235+ Communities Have Processed CP Requests

<u>Years</u>	<u>Projects</u>	<u>Communities</u>	<u>New Communities</u>
1970s	67	50	
1980s	188	113	89
1990s	139	92	42
2000s	248 filings	121	29

- Most CP requests are approved locally

7

Changing Levels of Affordability

- As public subsidy programs have been reduced or eliminated, affordable units must be supported by other means (increased density, market priced units), lowering ratio of affordable-to-market units

▪ Avg % affordable - 1970s	97%
▪ Avg % affordable - 1990s	54%
▪ Avg % affordable - 1980s	67%
▪ Avg % affordable - 2000+	27%

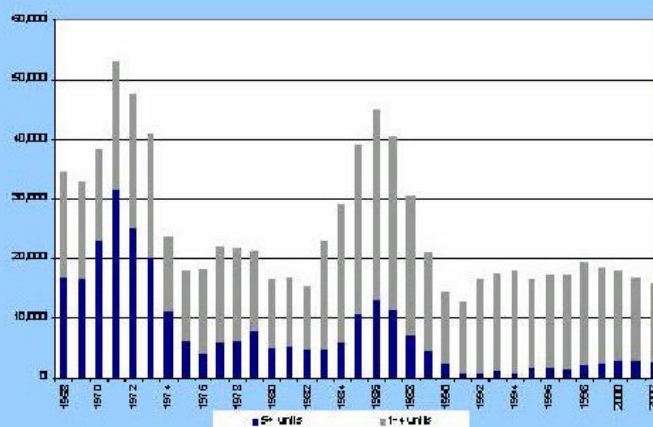
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CP as a Production Tool

- Originally a *vehicle* to enable state and federal production programs to work in more communities
- Now one of *a very few* tools available to build housing of any type, for all income groups
- CP creates affordable *and* market rate units
 - Vehicle for harnessing market-supported low/mod income housing
 - Impetus for recent upturn in market rate rental production

9

Massachusetts Building Permits Over Time



10

Current Market Conditions

- In 80s, rising home prices and rents were matched by increased production
- During 90s, household growth increased faster than production of new units (9% v 6%)
 - ✓ Driving vacancy rates down and home prices & rents up
 - ✓ Creating pent-up demand
- Had housing starts kept pace with household growth, MA would have added additional 70,000 units during the 1990s

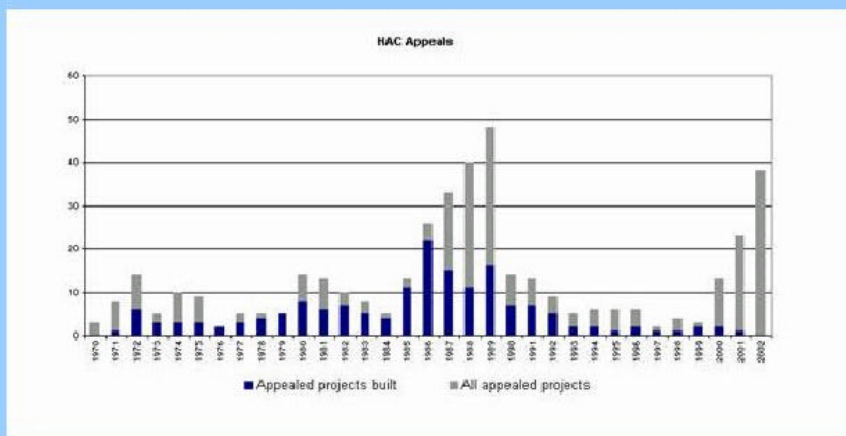
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Pipeline Analysis

- Historically about 60% of CP applications proceed to construction
- If every unit now under review (ZBAs, HAC, courts) were built over the next 3 years, housing starts would:
 - Increase by 30% over their 1995-2002 levels
 - Rise to 21,000 units/year
 - Remain well below the 27,700 unit average of the 1980s or the 30,500 unit average added in the 1970s

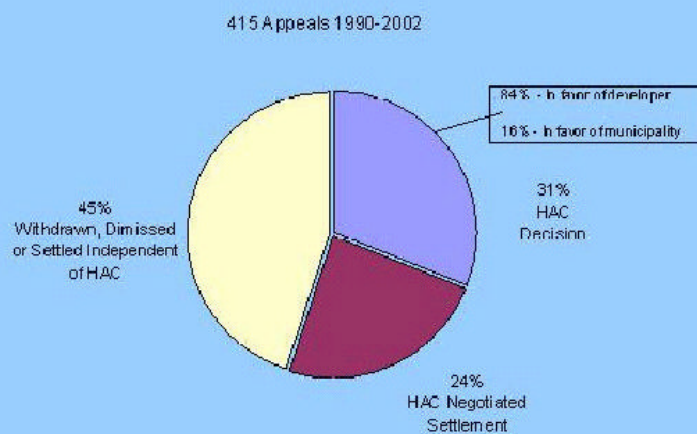
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HAC Caseload



13

Disposition of HAC Cases



14

Outcome of Appealed Cases

- Fewer than 1/2 the cases appealed between 1969 and 1999 were built, despite rulings or settlements that enabled them to proceed

<u>HAC Disposition</u>	<u>% Built</u>
Approved by HAC	62%
Negotiated settlement	56%
Withdrawn, dismissed, other	35%

- Generally 3 reasons account for this
 - Market forces
 - Power of delay
 - Availability of subsidies

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Updating the Subsidized Housing Inventory

- 17,400 units added in past 5 years
 - 7,300 - new construction
 - 3,100 - counting changes
 - 2,900 - homeowner and rental rehab
 - 2,700 - acquisition and preservation
 - 1,400 - all other
 - (4,500) - losses (EUR, other)

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Getting to 10%

- More communities are developing affordable housing strategies and timetables to expand housing options and attain 10% threshold
 - 32 communities have exceeded the 10% goal, up from 23 in 1997
 - 18 are at 8% or 9% and another 15 are at 6% or 7%
 - 55 communities need to produce or preserve 200 units or less to reach the 10% goal

17

Recent Progress

- Among the communities that have made significant progress:

<u>Community</u>	<u>Last 4 Yrs</u>	<u>Previous 30 Yrs</u>
Marlboro	588 units	488 units
Westborough	543 units	195 units
Peabody	476 units	711 units
Danvers	443 units	253 units
Wilmington	331 units	119 units
Abington	330 units	72 units
Raynham	275 units	193 units
Tyngsboro	266 units	116 units
Georgetown	210 units	140 units
Hadley	160 units	37 units

18